IN THE

# Supreme Court of the United States

October Term, 1977

No. 77-968

THE DETROIT EDISON COMPANY,
*Petitioner.*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AS AMICUS CURIAE

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### CONSENT TO FILING

This Amicus brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

### INTEREST OF AMICUS CURIAE

The American Psychological Association ("APA"), a non-profit professional organization founded in 1892, is the major association of psychologists in the United States. The purpose of the Association, as set forth in its Bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all its branches in the broadest and most liberal manner."

The Association has 47,000 members and includes the vast majority of psychologists holding doctorate degrees

from accredited universities in the United States. Approximately half of the members have a direct interest in psychological testing — the specific matter at issue in this case. However, because questions of confidentiality, privilege and privacy, as they pertain to the relationship between psychologists and their clients, are central to this case, all members of the Association, all other psychologists, and the clients whom they serve, could be directly and adversely affected by the decision of the National Labor Relations Board ("Board") as enforced by the United States Court of Appeals for the Sixth Circuit.

One of the APA's central functions is to establish ethical standards for the guidance of psychologists. The Association's code of ethics, binding on all members, is enforced by an ethics committee of APA designated specifically for this purpose. The committee, with the concurrence of APA's Board of Directors, has the authority to impose sanctions against members who violate the ethical code, including suspension or expulsion from the Association. Further, the APA's code of ethics has been incorporated in the laws of many states, thus governing the professional conduct of many nonmember psychologists licensed in those states.

APA also has been instrumental in developing testing standards for the validation and administration of psychological aptitude and other tests. The standards enunciated by Amicus have been referenced by the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance, and the Department of Justice in their respective guidelines on nondiscriminatory employee selection procedures.

Amicus has a direct interest in the outcome of this case because the decision of the Court of Appeals, if allowed to stand, undermines several principles of its ethical code pertaining to confidentiality and client relationships as well as important standards relating to test security necessary to assure the validity of psychological testing.



## SUPPLEMENTAL STATEMENT OF THE CASE[1]

This matter arises from a decision of the United States Court of Appeals for the Sixth Circuit enforcing an order of the National Labor Relations Board requiring Detroit Edison ("Company") to provide to the Utility Workers Union of America ("Union") employees' raw test scores and test papers from psychological aptitude tests without their consent, and copies of the actual test battery.

Detroit Edison has, for many years, used aptitude tests to predict job performance and to select applicants most likely to succeed in specific positions, including the Instrument Man position (A. 75, 178-79). One of the requirements for promotion to the Instrument Man job is a minimum grade of "recommended" on a battery of aptitude tests consisting of two widely used exams, the Minnesota Paper Form Board Test (MPFB)[2] and the Engineering and Physical Science Aptitude Test (EPSAT)[3] (A. 189, P.A. 20a). The tests are administered to the employees by the Company's Industrial Psychology Division, headed by Dr. William L. Roskind, a licensed psychologist in the state of Michigan and a member of the American Psychological Association (A. 74-77).

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[1]The Supplemental Statement is not a complete statement but rather sets forth those facts germane to the arguments propounded by Amicus.

[2]The Minnesota Paper Form Board Test is a widely employed aptitude test designed to predict the ability to visualize the interrelationship of parts in three-dimensional spaces, a skill shown to be important to perform the Instrument Man position (A. 193-95).

[3]The six-part Engineering and Physical Science Aptitude Test is used to examine aptitudes in the areas of mathematics and physical sciences (A. 198-99). EPSAT has been used for over thirty years to predict success in jobs relating to the physical sciences such as the Instrument Man position (A. 198, 204-05).

The test battery for the Instrument Man position has been validated on three separate occasions, twice by Detroit Edison and a third time, in 1972, by an independent testing organization (A. 190, 238, 343-67). All three studies showed a very high correlation between successful performance on the test battery and in the Instrument Man position, a fact uncontested by the Union (A. 190, 206, 239, 367). The validation studies also verified the appropriate cut off to predict successful performance in the Instrument Man position (P.A. 64a).

Employees are given the test battery by professional psychologists who assure them, before they take the test, that their actual test scores will be kept in confidence and that the only information that will be released is an interpretation of overall performance (A. 85, 445). To guard the confidentiality of this information, management is not given actual numerical scores, only a general evaluation of the applicants' performances on the test battery (A. 77, 83, 91, 127). Further, the test data are kept in a locked file to which only the Company's professional psychologists have access (A. 83).

Confidentiality of scores is maintained to prevent their misuse and to protect employees from damaging harassment and ridicule (A. 83-84). In fact, prior to the Company's institution of measures to safeguard test scores, several employees suffered ridicule at the hands of their peer employees because of indiscrete disclosure of low scores and terminated their employment with the Company (A. 84).

The Company's psychologists restricted access to the test battery and the actual test papers (A. 83) in order to ensure the validity of the tests (A. 77-78). The reliability of the selection process would be destroyed if copies of the test questions were disseminated to future applicants for promotion to the jobs for which the battery had been fully validated (A. 77-78).



In late 1971, Detroit Edison's professional psychologists administered the above-described test battery to employees seeking promotion to the Instrument Man position. When ten employees who took the battery were rejected for promotion for failure to obtain a "recommended" on the battery (P.A. 20a-21a), the Union filed a grievance against the Company. The central issue in the arbitration and NLRB proceedings which followed concerned what testing data the Company would make available to the Union. During the course of the proceedings, the Company and its professional psychologists furnished all of the following information to the Union:

(1) A written explanation of the test battery (A. 127-31).

(2) Representative samples of the kinds of questions that appear on both the Minnesota Paper Form Board and the EPSAT Tests (A. 125, 280).

(3) The Company's 1970 revalidation report (A. 343-53).

(4) The 1972 validation report conducted by the outside consultant, the National Compliance Company (A. 354-78).

(5) The raw test scores of all applicants, without employee identification (A. 279-80).

In further attempts to accommodate the Union's demands, the Company made the following proffers of information, each of which was refused by the Union:

(1) The Union demanded copies of each applicant's raw test score and test paper (A. 164). The Company offered to supply the raw test scores and test paper of any employee who consented (A. 7). However, the Union flatly refused to seek such consents (A. 44).

(2) The Union insisted that the Company provide it with copies of the actual test battery. The Company, having provided all the requested validation studies, a written explanation of the test battery, and sample questions, offered to permit the Union representative to take the test battery

(A. 6). The Union refused to accept this offer. The Company also offered to disclose the test battery and other requested testing materials to a qualified psychologist of the Union's choosing (A. 6). The Union also rejected this offer even though the test battery would have been useless to a lay person without the assistance of such a psychologist (A. 27, 50-51, 71-72, 79).

Although the Company's attempts at accommodation were rejected by the Union, the Board, in a two-to-one decision, ordered the Company to give the Union the raw test scores and actual test papers of the employees, without their permission, and the test battery (P.A. 16a). The only ostensible protection provided to safeguard the information was to order the Union not to copy the tests or to disclose them to past or future examinees (P.A. 16a). The dissenting Board member, who would have required the Company to divulge the test batteries only to a qualified psychologist of the Union's choosing, noted the futility of the Board's ineffectual restriction (P.A. 17a). Moreover, the Board's purported safeguards, limited as they were, did not cover the confidential test scores of the employees (P.A. 16a).

When the Company declined to comply with the Board's order, the Board sought enforcement by the Court of Appeals. The court, in a two-to-one decision, enforced the Board's order forcing disclosure of all the testing data demanded by the Union, including the confidential test scores of the employees, and the validated test battery (P.A. 7a-8a).

Judge Weick, dissenting, acknowledged the need to accommodate the competing interests at issue (P.A. 12a). Recognizing the confidential and privileged relationship between the administering psychologists and the examinees, he held that:

> "The disclosure of the test papers, as well as the individual scores, would subject the psychologists to the sanctions of disciplinary action which could result in their suspension or even revocation of their licenses by the state of Michigan" (P.A. 9a).



He further noted that the test battery was "in the custody of qualified psychologists" and that "disclosure of such papers would violate the Code of Ethics of the American Psychological Association which has been recognized by the statutes of the state of Michigan, Mich. Stat. Ann. §§ 14.677(1)(b)" (P.A. 8a, 9a).

In addition, Judge Weick pointed out the futility of the Board's proposal to protect the test materials from improper dissemination, labeling them as "really naive" (P.A. 11a) and concluded that the Board's order constituted a gross abuse of discretion because it recognized only the interests of the Union and failed to consider any of the other conflicting interests involved (P.A. 12a).

## SUMMARY OF ARGUMENT

The Court of Appeals has enforced an order of the National Labor Relations Board which, if not reversed, will require the disclosure to a union by professional psychologists of raw test scores and actual test papers of examinees without their consent, and of a validated test battery. The order constitutes an intrusion into the confidential relationship between the psychologist and the client, a relationship which is recognized in the over 35 states which accord it a testimonial privilege.[4] Disclosure of the raw test scores and actual test papers by the professional psychologist also contravenes the ethical principles of Amicus, principles which have been incorporated in the licensing laws of most of the states in the country.[5]

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[4] *See* note 12, *infra*.

[5] *See* note 31, *infra*.

These principles give paramount importance to the protection of clients' welfare, including the maintenance of the confidentiality of potentially embarrassing information such as test scores.

Disclosure of the raw test scores and actual test papers to union representatives, who have no professional obligation to safeguard their confidentiality or to refrain from misusing them, also constitutes an invasion of the examinees' rights of privacy.

Finally, the order of the court below requiring that a validated test battery be given to the Union conflicts with the mandate of Title VII, 42 U.S.C. §§ 2000e, *et seq.*, and other fair employment practice laws and regulations which require that methods of employee selection and promotion be nondiscriminatory. Pursuant to guidelines issued by three federal agencies charged with responsibility to insure nondiscriminatory employment practices,[6] only tests which have been validated according to standards developed by the APA may be used in employee selection and promotion. Disclosure of such tests to persons with no professional obligation to protect their security will destroy the tests' validity.

## ARGUMENT

### I. FUNDAMENTAL INTERESTS OF EMPLOYEES AND PSYCHOLOGISTS ARE IGNORED BY UNLIMITED DISCLOSURE TO THE UNION OF PSYCHOLOGICAL TEST SCORES AND TEST PAPERS LINKED WITH THE NAMES OF THOSE TESTED

In ordering Detroit Edison to provide the Union with the actual test scores and test papers of individual examinees, the NLRB and the Court of Appeals have respected only the

[6] *See* note 40, *infra*.



asserted interests of the Union,[7] and have ignored important interests of the tested employees and the psychologists.[8] Detroit Edison attempted to accommodate all competing interests by providing to the Union the test scores of all the examinees, without matching the scores with their names, information unavailable to Company management. The Company did offer to match test scores with the identities of those examinees who consented; however, the Union refused to seek such consents.

### A. Disclosure of Employee-Linked Psychological Scores and Test Papers Ignores the Employee's Interest in a Confidential Relationship with the Psychologist

Confidentiality is crucial to fostering the degree of openness between the psychologist and tested employees necessary to the provision of professional psychological services.[9] The Detroit Edison employees consented to take the

[7] *See Kroger Co.* v. *NLRB*, 399 F.2d 455, 457 (6th Cir. 1968), where the court recognized that "the critical issue appears to be how to recognize and how adequately to protect each of the conflicting interests that are involved here."

[8] The NLRB has asserted that no employee has raised any objection to the disclosure of his test scores. However, neither has any employee *consented* to disclosure. Moreover, no employee is a party to this action. The administering psychologists have a duty imposed by their code of ethics and state licensing laws to maintain the confidentiality of test results unless the client consents to disclosure.

[9] The Court of Appeals dispensed summarily with the claim of confidentiality and privilege by analogizing to a case which held that a promise made by a company that it would not disclose economic data gathered from neighboring companies was not a valid defense to a union's request for information. *General Electric Co. v. NLRB*, 466 F.2d 1177, 1185 (6th Cir. 1972). The confidentiality required to foster a fruitful relationship between psychologists and their clients and to protect the clients' privacy rights is quite different from a corporation's interest in preservation of economic data.

psychological aptitude tests with specific assurances that their test scores and responses would be held in strictest confidence.[10] The effective operation of psychological tests requires that individuals be placed in an atmosphere in which they can display candor and honesty. Whether in a testing or therapeutic situation, a psychologist's clients may be called upon to reveal personal thoughts, experiences, and memories. The psychologist's clients would refrain from making such revelations without the assurance that their communications would be held in confidence.

To ignore the confidential relationship between the examinee and the psychologist would have a substantial chilling effect on prospective test takers. If those who agree to be tested face disclosure of their responses, many will choose test answers they feel will not subject them to embarrassment or harassment, thereby destroying the accuracy of the examination and the psychologist-client relationship. Others will refrain entirely from participating in the tests, even if it means foregoing the opportunity of employment or advancement.

These considerations underlie the many state licensing laws that assure confidentiality in the psychologist-client relationship.[11] These states have thereby recognized the injury to the professional relationship and to the individual client that can result from disclosure of psychological test scores. Legislatures in a large majority of states also have

[10]Even had these assurances not been given, the employees could justifiably rely on their relationship with the psychologist to protect their test scores from disclosure. The fact that the psychologist was retained by the employer does not alter the client-psychologist relationship. *See Tweith v. Duluth, M & I Ry. Co.*, 66 F. Supp. 427 (D. Minn. 1946).

[11]*See* footnote 31, *infra*.



recognized the need for confidentiality by granting a testimonial privilege to client communications with a psychologist.[12]

Amicus does not urge that this Court must find a privileged relationship in this case. Rather, APA submits that the interests of the psychologist and employee should

[12]The following states have recognized a psychologist-client privilege: Ala. Code tit. 34, § 26-2 (1975); Alaska Stat. § 08.86.200 (1977); Ariz. Rev. Stat. Ann. § 32-2085 (1976); Ark. Stat. Ann. § 72-1516 (1957); Cal. Bus. & Prof. Code § 2918 (Deering 1975) and Cal. Evid. Code §§ 1010-1028 (Deering 1966 & Supp. 1978); Colo. Rev. Stat. § 13-90-107(g) (1973); Conn. Gen. Stat. § 52-146c (1977); Del. Code Ann. tit. 24, §3518 (1974); D.C. Code Ann. §§ 2-496, 14-307 (1973); Fla. Stat. Ann. § 490.32 (Aupp. 1978) (released July 1, 1978), § 90.503 (Special pamphlet 1978) (effective July 1, 1978); Ga. Code Ann. § 84-3118 (1975); Idaho Code § 54-2314 (Supp. 1977); Act of Aug. 15, 1963, 1963 Ill. Laws 2912, § 6, *reprinted in* Ill. Ann. Stat. ch. 91-½, § 406 (Smith-Hurd 1966); Ind. Code Ann. § 25-33-1-17 (Burnes 1974); Kan. Stat. § 74-53-23 (1972); Ky. Rev. Stat. § 319.111 (1978); La. Rev. Stat. Ann. § 2366 (West 1974); Me. Rev. Stat. tit. 14 R. Evid. 503 (Supp. 1975); Md. Cts. & Jud. Proc. Code Ann. § 9-109 (1974 & Supp. 1977); Mass. Ann. Laws ch. 233, § 20B (Michie/Law. Co-op. 1974 & Supp. 1978); Mich. Comp. Laws Ann. § 338.1018 (1976); Minn. Stat. § 595.02(7) (1976); Miss. Code Ann. § 73-31-29 (1972); Mo. Rev. Stat. § 337.055 (Supp. 1978); Mont. Rev. Codes Ann. § 66-3212 (Supp. 1977); Neb. Rev. Stat. § 27-504 (1975); Nev. Rev. Stat. §§ 49.215-49.245, 49.290 (1977); N.H. Rev. Stat. Ann. § 330-A:19 (1966); N.J. Stat. Ann. § 45:14B-28 (West 1978); N.M. Stat. Ann. § 67-30-17 (1974); N.Y. Civ. Prac. Law § 4507 (McKinney 1963 & Supp. 1977); N.C. Gen. Stat. § 8-53.3 (1969); N.D. Cen. Code R. Evid. 503 (Supp. 1977); Ohio Rev. Code Ann. §§ 4732.17(d), 4732.19 (Page 1977), 2717.02 (Page 1953 & Supp. 1978); Okla. Stat. tit. 59, § 1372 (1971); Or. Rev. Stat. § 44.040(h) (1977); Pa. Stat. Ann. tit. 63, § 1213 (Purdon Supp. 1977); S.D. Compiled Laws Ann. § 19-2-3.1 (Supp. 1977); Tenn. Code. Ann. § 63-1117 (1976); Utah Code Ann. § 58-25-8 (Supp. 1977); Va. Code § 8.01-399 (1977); Wash. Rev. Code § 18.83.110 (1976); Wyo. Stat. § 33-27-103 (1977).

be given appropriate consideration and not totally subordinated to the asserted interests of the Union.[13]

### B. Recognition of the Confidentiality of the Employee's Test Scores and Test Papers Protects the Employee's Privacy.

Confidentiality is also essential to protect the client's privacy.[14] Tested employees now face the prospect that their psychological and intelligence test scores and their personal responses may become common knowledge of the Union and their peers. Disclosure of the test scores to persons unqualified to interpret them and possibly hostile to the very concept of testing subjects the tested employees to the risk of damaging harassment and embarrassment.[15] A

[13]The court ordered disclosure without any demonstration of need by the Union. Presumably, the Union hoped that the matched test scores would somehow be useful in its grievance with Detroit Edison, but the mere assertion that information is necessary does not require an employer to supply the information in the exact form requested. *See National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

[14]*See* Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence*, 64 GEO. L.J. 613, 647-57 (1976), which recognizes that a psychologist-client privilege is essentially a corollary of a right to privacy.

[15]Unlike the psychologist, the Union is under no professional or ethical duty to safeguard against the improper dissemination of the test scores and papers. Indeed, the Union has an incentive to encourage dissemination. The Company's use of psychological testing as a criterion for job placement thwarts the attainment of the Union's goal of seniority as the sole criterion for job advancement. It is therefore in the Union's self-interest to create disrespect for the tests. One method to accomplish this aim would be to publish the scores of "top-notch" employees who fared poorly on the tests or to ridicule the test answers of those who did well, in the guise of showing that the test is not a valid predictor of job success. The Union has not demonstrated any interest in, or appreciation for, the nature and severity of the effect of disclosure on the employees involved.



severe societal stigma attaches to any suggestion of mental deficiency.[16] Even those tests that do not, in fact, measure mental deficiency are often perceived as such by the uninformed when such tests are administered by a psychologist.

In the context of psychological testing, the employees' right to privacy must, at a minimum, include the freedom to choose the circumstances under which their intelligence scores, aptitudes and opinions are to be divulged.[17] This Court has acknowledged that the individual's right of privacy protects against disclosure of personal data.[18] In *Whalen v. Roe*, 429 U.S. 589 (1977), this Court upheld the constitutionality of a

[16]The court in *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973), recognized the danger to the individual of the dissemination of school-administered psychological test results. The court found that publication of such test scores could result in "scapegoating in which a child might be marked out by his peers for unpleasant treatment . . . ." *Id.* at 915.

[17]It has been said that:

> "The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others. The right to privacy is, therefore, a positive claim to a status of personal dignity — a claim for freedom, if you will, but freedom of a very special kind."

Reubhausen & Brim, *Privacy and Behavioral Research*, 65 COL. L. REV. 1184, 1189-90 (1965).

[18] "The cases sometimes characterized as protecting privacy have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."

*Whalen v. Roe, supra*, 429 U.S. at 589-600 (notes omitted).

New York law which required the state to keep records of the names and addresses of all individuals obtaining certain drugs by prescription. The state law strictly prohibited disclosure of the patients' names. The Court recognized the privacy interests of the plaintiffs and the potentially embarrassing and harmful effect of disclosure, but found that the statutory scheme "evidence(s) a proper concern with, and protection of, the individual's interest in privacy," *id.* at 605, since access to the confidential information was rigidly safeguarded, *id.* at 601-02.[19]

No such safeguards or concern for the rights of the individual are evident in the Court of Appeals' approach to the present case. To the contrary, the Union has successfully rejected all offers by the Company which would safeguard the data from indiscriminate use.[20]

Congress, the courts, numerous states, and the psychologists' code of ethics all recognize that the disclosure of personal information akin to that involved here can invade the individual's privacy. The individual's

[19]Justice Brennan, concurring, summarized the Court's opinion as follows:

> "The Court recognizes that an individual's interest in avoiding disclosure of personal matters is an aspect of the right of privacy, *ante*, at 598-600, and nn. 24-25, but holds that in this case, any such interest has not been seriously enough invaded by the State . . . .
>
> "In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure."

429 U.S. at 606-07.

[20]The Court of Appeals adopted the Board's restrictions on the use of the actual test battery. Amicus asserts that this restriction is no more than an ineffective admonition. But even this insignificant protection was not afforded to the employees' test scores or answer sheets.



right to personal privacy has been protected either by assuring confidentiality or providing very limited and protected disclosure.

Thus, in the Professional Standard Review Law, 42 U.S.C. §§ 1320c, *et seq.* (Supp. V 1975), Congress accommodated the government's need for access to information concerning the cost and use of Medicare and Medicaid aid with the individual's rights of privacy by requiring the coding of the patient's name so as to "provide maximum confidentiality as to the patient's identity . . . ." 42 U.S.C. § 1320c-4(a)(4). To assure compliance, Congress attached criminal penalties for the unauthorized disclosure of the data. 42 U.S.C. § 1320c-15. A three-judge district court, in upholding the statute's constitutionality, reiterated that "maximum confidentiality is to be maintained concerning the information furnished by the physicians to the Professional Standards Review Organizations." *Association of American Phys. & Sur. v. Weinberger*, 395 F. Supp. 125, 136-37 (N.D. Ill.), *aff'd*, 423 U.S. 975 (1975).

Similarly, the Freedom of Information Act permitting public access to a wide range of government reports and information, exempts from disclosure those requests seeking "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Court of Appeals for the District of Columbia explained that the exemption is "designed to protect individuals from public disclosure of intimate details of their lives, whether the disclosure be of personnel files, medical files, or other similar files." *Rural Housing Alliance v. United States Dept. of Agr.*, 498 F.2d 73, 77 (D.C. Cir. 1974) (note omitted). In another FOIA suit, *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), this Court held that disclosure of material contained in personnel and medical files that

would otherwise "constitute a clearly unwarranted invasion of privacy" would be permissible only if the names and identifying characteristics of the subjects were deleted.

Even in the absence of congressional mandate, courts have attempted to accommodate the individual's need for privacy in personal information with competing interests.[21] In *Lora v. Bd. of Ed. of City of New York*, 74 F.R.D. 565 (E.D.N.Y. 1977), the court accommodated the interests of students in the privacy of psychological diagnostic files with those of a litigant asserting a class action civil rights claim on the students' behalf. The plaintiff sought production of randomly selected, *anonymous* diagnostic and referral files. In determining whether to permit even this limited disclosure, a disclosure similar to that voluntarily made by Detroit Edison, the court asked the following four questions:

> "First, is the identification of the individuals required for effective use of the data? Second, is the invasion of privacy and risk of psychological harm being limited to the narrowest possible extent? Third, will the data be supplied only to qualified personnel under strict controls over confidentiality? Fourth, is the data necessary or simply desirable?"

*Id.* at 579.[22]

[21] *See Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973), which held that a school-administered psychological personality test, seeking answers to personal and intimate questions, violated the students' right to privacy. The test invaded the privacy of the students because they were given no real choice but to take the test and because the students' responses were not safeguarded. In the instant case, although the examinees did consent to taking the tests, failure to safeguard the examinees' scores and responses would in itself invade their privacy — particularly in view of the assurance they were given that their scores would be held in confidence.

[22] The court in *Lora* recognized that "[m]ost persons protest not the mere disclosure of private embarrassing or damaging information, but rather the concomitant disclosure of identifying data." 74 F.R.D. at 580. However, the court noted that even the elimination of all identifying data, "while undoubtedly reducing the degree of invasion of privacy attendant upon dissemination, does not necessarily, then, reduce that invasion to zero." *Id.* at 582.



In the instant case, neither the Board nor the Court of Appeals addressed these important questions. Amicus submits that the answers to these questions would preclude production of the test scores and papers. The Union, dissatisfied with the information provided in anonymous form, made no showing that the correlation of the names of the examinees with their scores was useful. The Court of Appeals ordered unbridled disclosure of the materials to Union personnel who are not qualified to interpret them without any consideration of whether the disclosure would invade the examinees' privacy or result in a risk of psychological harm.

### C. Requiring the Psychologist to Disclose A Client's Test Scores and Test Papers Breaches the Confidential Relationship Established with the Client and Violates the Psychologist's Code of Ethics.

Not only did the NLRB and the Court of Appeals ignore the interest of the tested employees, but they also disregarded the professional responsibilities of the psychologist. Disclosure of the test scores and papers to the Union requires that psychologists breach the confidential relationships established with their clients. Denying confidentiality of the relationship has the potential to destroy not only the trust the examinees placed in the psychologist, but also public trust in psychologists generally. The court's decision may well force psychologists to refrain entirely from

keeping records in order to preserve their clients' privacy and the integrity of the relationship,[23] resulting in inferior service to their clients.

Moreover, the court's order is in direct conflict with the psychologists' ethical standards[24] and state licensing laws,[25] including Michigan's,[26] which incorporate those standards. The *Ethical Standards of Psychologists* promulgated by the American Psychological Association were designed expressly to assure confidentiality and protect the privacy of those served by psychologists.[27] The denial of these interests would, in the words of Principle 3 of the *Ethical Standards*, "reduce the trust in psychologists held by the general public." Only if the integrity of these standards is respected by the courts can they continue to serve as guidelines to the practicing psychologist and a force for ethical treatment of the public. The Court of Appeals' order profoundly discourages the enforcement of ethical standards for psychologists.

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[23] *See* Slovenko, R., *Psychotherapy, Confidentiality, and Privileged Communication*, 116 (1966):

> "[T]he best protection that can be ensured to the patient is the exercise of extreme caution in writing records. . . . Incomplete clinical records, of course, are not scientifically desirable, but the therapist is in the unfortunate position of having to choose between keeping incomplete records or no records at all, or, on the other hand, of subjecting his patient to the possibility of having his most intimate confidences revealed. . . ."

[24] American Pschological Association, *Ethical Standards of Psychologists* (1977 Revision).

[25] *See* note 31, *infra*.

[26] Mich. Stat. Ann. § 14.677(1)(b) (Cum. Supp. 1975).

[27] During the period 1970 through 1976, APA's committee on ethics took punitive action, ranging from censure to expulsion, against seven psychologists for violation of the code's requirement that client communications be kept strictly confidential.



The Ethical Standards place upon the psychologist a "primary obligation" to safeguard "information about an individual that has been obtained . . . in the course of . . . teaching, practice or investigation . . . ." Preamble to Principle 5. The court's decision to order disclosure of the matched test scores to the Union directly contravenes this confidentiality standard. The order totally ignores the psychologist's efforts to assure "the dignity and worth of the individual and honor the preservation and protection of fundamental human rights." Preamble to *Ethical Standards of Psychologists*.

Further, the *Ethical Standards* specifically safeguard the individual's test scores by directing that psychologists "strive to insure that the test results and their interpretation are not misused by others." Principle 8c. According to the *Standards for Educational and Psychological Tests*, a companion document to the *Ethical Standards of Psychologists*, "[t]est scores should ordinarily be reported only to people who are qualified to interpret them."[28] Neither the Union nor its members are qualified to interpret or use the scores properly. The Union's refusal to place the scores in the hands of a psychologist qualified to interpret them suggests to Amicus that the Union may in-

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[28] American Psychological Association, *Standards for Educational and Psychological Tests*, J2. The comment to Standard J2 recognizes that "curious peers should not have access" to test scores. While Amicus does not contend that the Union itself is a curious peer, its members would be considered such. Moreover, the Union has an incentive to publicize these scores. *See* note 15, *supra*. Further, the comment does not, as asssrted by the NLRB in its brief opposing the petition for a writ of certiorari, leave open the question "whether untrained people should be given test scores." Rather, the unanswered question involves whether untrained persons who must make a decision to admit or hire based on the tests should be given training necessary for the interpretation of scores or the interpretation. The Union was given the interpretation of the test scores; the training of a Union employee has never been an issue in this case.

deed intend to use the scores in a manner harmful to those tested. "Psychologists know that they bear a heavy social responsibility because their recommendations and professional actions may alter the lives of others." Principle 1e. Untrained Union officials may not appreciate the potential effect the improper use of test results may have on others.

The ethical standards make every effort to protect the privacy rights and integrity of the relationship not only by safeguarding dissemination of personal information to outsiders but also by regulating the psychologist's own use of the data. The psychologist may discuss a client's case only for professional purposes with persons having a particular concern with the case. Principle 5b. Written and oral reports must be made with "every effort . . . to avoid undue invasion of privacy," Principle 5b, and "clinical and other materials [may] be used in classroom teaching and writing only when the identity of the persons involved is adequately disguised." Principle 5c. The psychologist must also provide "for the maintenance of confidentiality in the retention and ultimate disposition of confidential records." Principle 5f.[29]

Finally, the court's order directly contravenes the psychologist's responsibility to inform the client of the limits of confidentiality. Principle 5d.[30] The decision of the

[29]To assure confidentiality, Dr. Roskind, Detroit Edison's psychologist, maintains the records in a locked file cabinet in his office. No one, other than professional psychologists, has access to the scores (A.83).

[30]The NLRB asserts in its brief opposing the petition for a writ of certiorari that "it is highly speculative that the Code of Ethics would in fact be breached by the Board's order" as the APA's contentions are based on violation of the court's restrictions by the Union. While the Board and the Court did place restrictions on the Union's use of the test battery itself, neither the Board nor the Court of Appeals restricted the Union's use of the test scores and papers.



Court of Appeals requires the psychologist to violate this principle and to repudiate the assurances of confidentiality given to the employees prior to their taking the tests.

If the Court of Appeals' decision is not reversed, psychologists will be forced to give a disclaimer of confidentiality when testing clients. Such a disclaimer could result in employees foregoing the opportunity of job advancement in fear that their test papers and scores will become the subject of public knowledge and comment. Those who take the test will do so without the candor necessary for valid testing.

Requiring Detroit Edison psychologists to breach professional confidences places them in a crossfire of conflicting demands. The Court of Appeals demands disclosure while the psychologists' professional ethics and obligations require confidentiality. The Union has asserted no justification to compel such a result.

The *Ethical Standards* of the APA govern not only the conduct of APA's members but also that of many nonmember psychologists since over thirty states, including Michigan, require compliance with the APA *Ethical Standards* by licensed psychologists.[31] Psychologists who violate

[31]*See* Ala. Code tit. 34, § 26-3 (1975); Ark. Stat. Ann. § 72-1517 (1957); Conn. Gen. Stat. § 20-186 (1977); Del. Code Ann. tit. 24, § 3513(a)(8) (1974); D.C. Code Ann. § 2-491(e) (1973); Ga. Code Ann. § 84-3105 (1975); Idaho Code § 54-2305(b)(1) (Supp. 1977); Ill. Ann. Stat. ch. 91-½, § 415(7) (1966 & Supp. 1978); Ind. Code Ann. § 25-33-1-3(h) (1974 & Supp. 1977); Iowa Code Ann. § 147.76 (Supp. 1977); Kan. Stat. § 74-5308(a) (1972); Ky. Rev. Stat. § 319.081 (1978); Me. Rev. Stat. tit. 32, §§ 3816, 3837 (1977); Md. Ann. Code, art. 43, § 627 (1971); Mass. Ann. Laws ch. 112, § 119(d) (Michie/Law. Co-op. 1975); Mich. Comp. Laws Ann. § 338.1001(b) (1976); Minn. Stat. § 148.98 (1976); Miss. Code Ann. § 73-31-21(a)(1) (1972); Mont. Rev. Codes Ann. § 66-3209(1)(d) (Supp. 1977); Neb. Rev. Stat. § 71-3807 (1976); N.J. Stat. Ann. § 45:14B-24(e) (West 1978); N.C. Gen. Stat. § 90-270.15(a)(4) (1975 & Supp. 1977); N.D. Cen. Code § 43-32-27(7) (Supp. 1977); Okla. Stat. tit. 59, § 1361 (1971); Or. Rev. Stat. § 675.110(10) (1977); S.C.

the standards are subject to suspension or revocation of their licenses.[32] Disclosure of test scores and papers violating the official standards could subject the psychologist to such discipline.[33]

The failure of the Board and the Court of Appeals to consider the interests of the employees and the psychologists must be corrected. "The material which the company did furnish to the union was . . . sufficient to permit the union to process adequately the grievance pending before the Arbitrator, or to perform its duties under the collective bargaining agreement." (P.A. 11a) (Judge Weick, dissenting).

Moreover, the court's and Board's total rejection of the interests of the psychologist and the employee was not limited to the context of industrial psychological aptitude testing for employment promotions. The court has placed the interests of psychologists and tested employees in a totally subservient position to the naked claim of the Union for information. It is evident that any disclosure of con-

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Code § 40-56-60 (1976); S. D. Codified Laws Ann. §§ 36-27-27, 36-27-38(6) (1977); Tenn. Code Ann. §§ 63-1118, 63-1119 (1976); Tex. Rev. Civ. Stat. Ann. art. 4512C(8)(a) (Vernon 1976); Utah Code Ann. § 358-25-11(10) (1974 & Supp. 1977); W. Va. Code § 30-21-6-(a)(3) (1976). *See also* the following states which have patterned their codes of ethics after the APA *Ethical Standards:* Colo. Rev. Stat. § 12-43-104(3)(a) (1973); Haw. Rev. Stat. 465-6(4) (1967); Mo. Rev. Stat. § 337.035(1)(4) (Supp. 1978); N.M. Stat. Ann. §67-30-5(B)(1) (1974); Pa. Stat. Ann. tit. 63, § 1205(2) (Supp. 1977); Wis. Stat. Ann. § 455.08 (1974).

[32]*See* Mich. Stat. Ann. § 14.677(10)(6) (Cum. Supp. 1975).

[33]Amicus does not assert that the State of Michigan or the APA would discipline Dr. Roskind, Detroit Edison's industrial psychologist, for disclosing the test scores or papers pursuant to the court's order. However, the fact that Michigan and the APA would not place Dr. Roskind in such an untenable position in no way justifies the fact that the court's order does violence to the ethical standards and the licensing laws of Michigan.



fidential and private communications between an industrial psychologist and his clients could be ordered based upon such a precedent. By refusing to recognize any confidential relationship between the industrial psychologist and the tested employee, the court has threatened every aspect of the confidentiality of that relationship — whether involving psychological testing or counseling at a school, in an institution, at work, or in private psychotherapy.

## II. DISCLOSURE TO THE UNION OF PSYCHOLOGICAL APTITUDE TESTS WILL DESTROY THE VALIDITY OF THE TESTS AND RESULT IN VOIDING OBJECTIVE AND NONDISCRIMINATORY EMPLOYEE SELECTION PROCEDURES

The decision of the Court of Appeals, requiring a professional psychologist to provide directly to the Union a standardized, validated test battery, poses a substantial threat to the continued use of objective, nondiscriminatory employee selection devices, such as validated psychological aptitude tests. The Court of Appeals' decision is directly at odds with the nondiscriminatory employee selection procedures mandated by Title VII, 42 U.S.C. §§ 2000e, *et seq.*, Executive Order 11246, and the guidelines issued pursuant thereto by federal agencies charged with enforcement of equal employment laws and orders.

The use of psychological aptitude tests for employment purposes has become widespread in the United States both in the private and public sectors. Its usefulness as an aid toward objective and nondiscriminatory selection of employees has been demonstrated in several surveys,[34] in-

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[34]*See, e.g.*, Personnel Policies Forum in September, 1976 (PPF Survey #114, p. 1 (BNA, 1976)).

cluding a study conducted by the United States Civil Service Commission.[35]

With the increasingly widespread use of such tests, APA has adopted guidelines to insure the validity and fairness of those tests. Thus, the *Ethical Standards of Psychologists* promulgated by the Amicus and binding on all APA members, as well as on many nonmembers through incorporation in state licensing laws,[36] establishes standards for test administration, including procedures for test security.[37]

Further, APA, in conjunction with the American Educational Research Association and the National Council on Measurement in Education, has developed *Standards for Educational and Psychological Tests.*[38] The *Standards* have been developed to aid in assuring reliability and validity of testing by the psychological profession and in part to assure that psychological testing conforms with the requirement of Title VII and other fair employment practice laws that employee testing be nondiscriminatory. The *Standards* set forth with specificity the measures that must must be taken to provide evidence of testing reliability and validity. *See Standards* at 25-55. In order to protect test validity, the *Standards* require that "the test user share

[35]Status of Test Usage in FY 77, Test Services Section, Personnel Research and Development Center, United States Civil Service Commission (Dec. 1977).

[36]*See* statutes cited at note 31, *supra.*

[37]Principle 8 states in pertinent part that "test users avoid imparting unnecessary information which would compromise test security, but they provide requested information that explains the basis for decisions that may adversely affect that person . . . ." American Psychological Association, *Ethical Standards of Psychologists 6 (1977* Rev.).

[38]American Psychological Association, *Standards for Educational and Psychological Tests* (1974).



with the test developer or distributor a responsibility for maintaining test security." *Standards* at 67.[39] In the accompanying comment the rationale for test security is made clear:

> "In many cases, however, prior knowledge of test items or scoring procedures could destroy validity . . . security may be compromised where examinees have had much prior experience with a public test, have been taught specific test items or have heard a lot about the test."

*Standards* at 67.

The Court of Appeals, in enforcing the Board's order requiring full disclosure of the test battery to the Union, failed to consider either the interests of employers, or of professional psychologists in maintaining test security. As a result, professional psychologists are placed in the position of being required under court order to violate the *Ethical Standards* of the American Psychological Association which have been incorporated in the licensing laws of numerous states, including Michigan, as well as the *Standards for Educational and Psychological Tests*, by making available to the Union a test battery which it does not have the necessary skills or knowledge to use. Both the Board and the Court of Appeals arbitrarily refused to consider the logical alternative: to provide the test battery to a qualified psychologist of the Union's choosing for review.

If this Court does not reverse the order below, the test battery which has been validated on three separate occasions will be distributed to persons without responsibility to secure the tests. The likely consequence of disclosure to

[39]*See also* American Psychological Association, *Principles for the Validation and Use of Personnel Selection Procedures*, published by the Division of Industrial-Organizational Psychologists (1975). These principles similarly require that the psychologist or other test user be responsible for maintaining test securitty. *Id.* at 15.

lay persons, particularly to those who may in the future take the test battery, may well be to destroy the validity of the battery which necessarily depends on the naivete of the test taker.

Since the passage of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, a major objective in the use of psychological tests for employee selection has been to ensure that such tests are nondiscriminatory. By requiring disclosure of a validated test battery to a union representative, the Board and the Court of Appeals totally ignored the requirements of Title VII and the guidelines which have been issued by various enforcing agencies to ensure objectivity and nondiscrimination in employee selection procedures.

In guidelines issued by three of the agencies responsible for overseeing compliance with Title VII and related executive orders, the requirements of test validity and security have been recognized and the standards developed by the Amicus specifically incorporated.[40] The guidelines require that tests be validated pursuant to standards consistent with generally accpeted professional standards such as those developed by the APA in the *Standards for Educational and Psychological Tests.*[41]

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[40]*See, e.g.*, 29 C.F.R. § 1607.5(a) (Equal Employment Opportunity Commission); 28 C.F.R. § 50.14 (Department of Justice); 41 C.F.R. § 60-3.5 (Office of Federal Contract Compliance).

[41]*Id.* Further, the four federal government agencies charged with enforcement of fair employment practice laws, EEOC, Civil Service Commission, Department of Justice, and Department of Labor, recently proposed Uniform Guidelines on Employee Selection Procedures. 42 FED. REG. 65,542 (December 30, 1977). The proposed guidelines require test users to demonstrate validity of the tests, consistent with generally accepted professional standards "such as those described in the Standards for Educational and Psychological Tests," 42 FED. REG. § 5C, at 65,544, and provide for test security, 42 FED. REG. § 12, at 65,546.



On at least three separate occasions, this Court has recognized the importance of test validation to the enforcement of Title VII and similar laws. In the first case in which this Court considered this issue, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that the guidelines of the EEOC on testing were entitled to great deference, 401 U.S. at 433-34, and that tests were to be sanctioned only when they provided a "reasonable measure of job performance." 401 U.S. at 436. The Court's mandate in *Griggs v. Duke Power* can be met only if tests are validated; the irresponsible disclosure ordered by the Board and the Court of Appeals would make validation impossible.

In a second case, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court reemphasized the deference to be given to EEOC's testing guidelines. The Court specifically noted that "these guidelines draw upon and make reference to professional standards of test validation established by the American Psychological Association." 405 U.S. at 431. Further, the Court made clear that tests used for selection and promotion of employees were to be judged by whether they comported with the guidelines for validation set forth by the Amicus. *See also Washington v. Davis*, 426 U.S. 229, 247 & n.13, 251 & n.17 (1976); *Kirkland v. New York St. Dept. of Correctional Serv.*, 520 F.2d 420, 426 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

The Court of Appeals for the Second Circuit, when faced with an issue similar to that addressed by the Board and the Court of Appeals in this case, recognized the importance of test security and the prejudice to future test takers if tests were disseminated to future examinees. In *Kirkland v. New York St. Dept. of Correctional Serv., supra*, 520 F.2d 420, a race discrimination case, the Second Circuit overturned that part of a district court's order requiring the defendant to make available for plaintiffs' review a new promotion

test. 520 F.2d 427, 431. The Court of Appeals in *Kirkland* recognized that tests, to be sanctioned as objective and nondiscriminatory, must be validated in accordance with EEOC guidelines and specifically addressed and upheld the need for test security:

> "The District Court ordered that the new test prepared by defendants be submitted to the plaintiffs for review. We find this requirement difficult to comprehend. Presumably, this examination will be taken by members of the plaintiff class in competition with others. Permitting advance review by plaintiffs would place all others at a competitive disadvantage. If the District Judge is seeking professional assistance from plaintiff's expert, his order should so provide; and proper steps should be taken to insure confidentiality."

520 F.2d at 427.

Unlike the Board and the Court of Appeals in this case, the court in *Kirkland* reached an equitable balance by holding that if tests are to be provided to adverse parties, they should be disclosed only through the agency of an expert professional psychologist. As this Court and the Sixth Circuit have recognized, the National Labor Relations Board should seek to acknowledge and accommodate all legitimate interests involved in a proceeding before it. *See, e.g., National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956); *Kroger Co. v. NLRB*, 399 F.2d 455, 457 (6th Cir. 1968).

Even before passage of Title VII, the General Counsel of the Board refused to find a violation of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, by an employer for refusing to disclose copies of psychological test questions to a union. In that case, as here, the company had explained to the Board that advance inspection would allow the content of the test to be widely disseminated "and thus impair



the usefulness of the test." NLRB G. C. Adm. Rul. No. SR-657, 46 L.R.R.M. 1387, 1388 (1960). *See also* NLRB G. C. Adm. Rul. No. SR-477, 46 L.R.R.M. 1252 (1960).

Detroit Edison has offered to provide the test battery, which is in the possession of psychologists professionally obligated to guard its security, to a qualified psychologist of the Union's choosing. Clearly this would accommodate the interests of the Company, the Union, professional psychologists, and future examinees. At the same time, it would balance the mandate of the National Labor Relations Board to insure informed collective bargaining with the equally significant mandate of Title VII and the professional standards of psychologists to insure objective and nondiscriminatory employee selection procedures. *See, e.g., National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Kroger Co. v. NLRB*, 399 F.2d 455, 457 (6th Cir. 1968).

## CONCLUSION

Amicus American Psychological Association respectfully submits that for the above stated reasons this Court should reverse the decision of the United States Court of Appeals.

Respectfully submitted,

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